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SERIES I: Subject File

U.S. Department of Justice

Office of Legal Policy

February 9, 1983

TO: John Roberts

FROM: Steve Brogan

John:

Enclosed are the materials relating to the Intercircuit Tribunal that we discussed on the phone this afternoon. Yell if you want anything additional.

SJB

Enclosures

file -
Supreme Court

U.S. Department of Justice

Office of Legal Policy

Washington, D.C. 20530

MEMORANDUM

February 9, 1983

TO: Paul Bator
Deputy Solicitor General

FROM: David J. Karp
Attorney Advisor

SUBJECT: Intercircuit Tribunal Proposal

Pursuant to our phone conversation this morning, I am attaching a number of items that may be of use to you in considering the Intercircuit Tribunal proposal.

In the 97th Congress, Jonathan Rose testified on S. 1529, a bill proposing the creation of a national court of appeals. We later sent a response letter on a rather different national court proposal which was introduced by Senator Heflin as S. 2035. Copies of the testimony on S. 1529 and the letter on S. 2035 are attached.

Near the end of the 97th Congress, the Intercircuit Tribunal proposal surfaced as part of the Dole and Butler bankruptcy packages. This proposal had been introduced earlier as H.R. 4762 by Rep. Kastenmeier. Some memoranda generated at the time are attached. These are: (i) a critical memorandum from the Civil Division (ii) a critical memorandum from the Tax Division (iii) two memoranda in which I defended the proposal, and (iv) a brief memorandum (by me) outlining different methods by which the members of such a tribunal might be selected. My favorable view of the proposal did not prevail, and in a letter to Senator Dole on the bankruptcy package (copy attached) we stated that we did not believe a sufficient case had been made for the proposal at that time. A copy of H.R. 4762, which is the bill closest in character to the proposal recently advanced by the Chief Justice, is also attached.

The final attached item is the portion of the Bork Committee Report addressing the national court of appeals proposal. The Bork Committee was a Committee of the Levi Justice Department set up to recommend reforms in the federal court system. Solicitor General Lee, who was then head of the Civil Division, was a member of the Committee.

In sum, the attachments are as follows:

(i) The testimony on S. 1529

(ii) The response letter on S. 2035

(iii) The Civil Division memorandum on the Intercircuit Tribunal Proposal

(iv) The Tax Division memorandum on the Intercircuit Tribunal Proposal

(v) My memoranda on the Intercircuit Tribunal proposal (one long memorandum and a short supplemental memorandum on the basic merit of the proposal and a memorandum on the method of selection)

(vi) An excerpt from the letter to Senator Dole on the bankruptcy package

(vii) A copy of H.R. 4762

(viii) An excerpt from the Bork Committee Report.

cc: Stephen J. Brogan
Deputy Assistant Attorney General

Department of Justice

STATEMENT

OF

JONATHAN ROSE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS
UNITED STATES SENATE

CONCERNING

S. 1529 - NATIONAL COURT OF APPEALS

S. 1531 - MANDATORY APPELLATE JURISDICTION OF THE SUPREME COURT

S. 1532 - VOIR DIRE CHANGES TO FEDERAL RULES

ON

NOVEMBER 16, 1981

Mr. Chairman and Members of the Committee:

I am pleased to appear before the Subcommittee on Courts to discuss the Administration's position on the following bills: (1) Senate Bill 1529, to establish a National Court of Appeals; (2) Senate Bill 1531, to eliminate mandatory appellate jurisdiction of the United States Supreme Court; and (3) Senate Bill 1532, to change the Federal Rules of Civil and Criminal Procedure regarding voir dire.

1. S. 1529, to establish a National Court of Appeals

S. 1529 would establish a National Court of Appeals. Its jurisdiction would extend to all matters referred to it by the Supreme Court, and its decisions would be binding on all lower federal courts. While this proposal offers some potential benefits, the Department of Justice believes that these benefits are outweighed by the adverse effects which we fear such a substantial change of our judicial structure might entail.

Proposals to create a National Court of Appeals have been discussed at length during the last ten years. Such proposals were intended to deal with the increasing workload of the Supreme Court and, especially, the burgeoning number of applications for certiorari. The dimensions of the increase can be illustrated by the number of cases on the docket of the Supreme Court. In 1949, there were 867 such cases; in 1980, there were

5,144. This six-fold increase occurred, of course, without any increase in the number of Justices (although the number of clerks did grow considerably). These statistics created considerable apprehension regarding the ability of the Justices to review adequately all the petitions for certiorari with which they were faced. The distinguished constitutional scholar, Professor Paul A. Freund of the Harvard Law School, has been among the most eloquent advocates of the need for strong action to deal with this situation.1/ Others, however (including some members of the Court), have denied the premise that inadequate attention is devoted by the Supreme Court to deciding cases on the merits or to the screening of cases.2/

In 1972, a Committee chaired by Professor Freund issued a report calling for the creation of a National Court of Appeals.3/ That proposal differed significantly from the legislation before you today. Under that proposal, the National Court of Appeals was intended to "screen all petitions for review now filed in the Supreme Court, and hear and decide on the merits

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1/ See, e.g., Freund, Why We Need the National Court of Appeals, 59 A.B.A.J. 247 (1973); and A National Court of Appeals, 25 Hastings L.J. 1301 (1974).

2/ See, e.g., Brennan, The National Court of Appeals: Another Dissent, 40 U. Chi. L. Rev. 473, 475-6 (1973).

3/ Federal Judicial Center Report of the Group on the Caseload of the Supreme Court (1972) (Administrative Office, U.S. Courts for Federal Judicial Center, Dec. 1972) (hereinafter cited as Freund Report).

many cases of conflicts between circuits."[4/] This proposal evoked considerable opposition in part because it removed from the Supreme Court to a lower decisional level its critical power to screen and thereby determine which cases the nation's highest court would decide.[5/]

In 1975, a commission chaired by the Honorable Roman L. Hruska proposed creation of a National Court of Appeals similar in structure and powers to that proposed in the current legislation.[6/] The Hruska Report stated that the purpose of a National Court of Appeals was "to increase the capacity of the federal judicial system for definitive adjudication of issues of national law."[7/] The desire to increase the capacity of the judicial system was based upon the existence of "inter-circuit conflicts, delay, uncertainty and the burden presently placed upon the Supreme Court to decide cases which are not truly impor-

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4/ Freund Report, supra note 3, at 18.

5/ See, e.g., Brennan, supra note 2, at 476. See also Gressman, The Constitution v. The Freund Report, 41 Geo. Wash. L. Rev. 951 (1973); Warren, A Response to Recent Proposals to Dilute the Jurisdiction of the Supreme Court, 20 Loy. L. Rev. 221 (1974). But see A. Bickel. The Caseload of the Supreme Court (1973); Freund, supra note 1; and Haynsworth, A New Court to Improve the Administration of Justice, 59 A.B.A.J. 841 (1973).

6/ U.S. Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change (1975), reprinted at 67 F.R.D. 195 (1975) (hereinafter cited as Hruska Report).

7/ Hruska Report, supra note 6, at 5, 67 F.R.D. at 208.

tant or otherwise not worthy of its resources."[8] Senator Hruska's recommendations generated considerable controversy.[9]

On December 10, 1975, Senator Hruska introduced Senate Bill 2762, which embodied the recommendations of the Hruska Report. The most significant difference between the court as proposed by Senator Hruska and that envisioned in the current bill is that S. 1529 provides that the National Court of Appeals would have jurisdiction only over cases referred to it by the Supreme Court, while Senator Hruska proposed that the court also have jurisdiction over cases transferred to it by the circuit courts of appeals.

In our view, the National Court of Appeals proposed by S. 1529 would probably help resolve some existing inter-circuit conflicts and might also unburden the Supreme Court of deciding cases of lesser significance. However, we are concerned that the

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8/ Id. at 13-14, 67 F.R.D. at 217-18. See also Hruska, The National Court of Appeals: An Analysis of Viewpoints, 9 Creighton L. Rev. 286 (1975), for amplification by Senator Hruska on the reasons why a National Court of Appeals might be desirable.

9/ See, e.g., Alsup, Reservations on the Proposal of the Hruska Commission to Establish A National Court of Appeals, 7 U. Tol. L. Rev. 431 (1976); Feinberg, A National Court of Appeals, 42 Brooklyn L. Rev. 611 (1976); Haynesworth, supra note 5, at 840; Owens, The Hruska Commission's Proposed National Court of Appeals, 23 U.C.L.A. L. Rev. 580 (1976). But see Hruska, supra note 8; Levin, Do We Need A New National Court?, 12 Trial 32 (1976); Rosenberg, Enlarging the Federal Courts' Capacity to Settle the National Law, 10 Gonz. L. Rev. 709 (1975).

proposed court would inevitably create additional burdens for the Supreme Court.

The new work which would be imposed upon the Supreme Court if the National Court of Appeals were created could be very substantial. A Committee chaired by former Solicitor General Robert H. Bork observed in 1977 that in addition to "simply accepting or declining to accept cases for review, [the Justices] would have to decide whether cases should be reviewed initially by the Supreme Court or referred to the National Court of Appeals. That determination would require considerable study to identify the pivotal issues of cases and to understand their ramifications."10/ At present, the Supreme Court has only to decide whether to take a case or not. The additional options created by the existence of the proposed court would require additional and difficult evaluations where the decision now is simply to accept or deny. Requests for review would become substantially more burdensome and time-consuming.

The responsibility to consider petitions for certiorari after the National Court of Appeals has decided a case referred to it would be an added new burden upon the court. As Judge Luther M. Swygert of the Court of Appeals for the Seventh Circuit

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10/ Department of Justice Committee on Revision of the Federal Judicial System, The Needs of Federal Courts at 18 (January 1977) (hereinafter cited as the Bork Report).

has noted, denials of certiorari would carry more weight than at present and therefore demand more attention and time:

> That a denial of certiorari has not represented a tacit affirmance of a decision is constitutional dogma. That dogma could not apply to a denial of a request for certiorari in a case decided by the National Court on referral. Decisions of the National Court made after referral by the Supreme Court would take on a dimension far different from those rendered by the courts of appeals. A decision not to review such an opinion by the National Court would imply that the Supreme Court not only adopted the result in that case but also tacitly approved the reasoning of the National Court in reaching the result. Will not deciding whether to review under such circumstances increase rather than decrease the burden of the Justices?11/

The Supreme Court, in addition, would have to monitor very closely the decisions of the National Court of Appeals to ensure that the latter's opinions were consistent with the philosophy of the higher court. The new court could in certain circumstances even serve to disrupt evolution of legal doctrines favored by the Supreme Court. Guarding against this would constitute an additional new burden on the Court.

Finally, it should be noted that the existence of a National Court of Appeals is likely to generate additional litigation. Litigants would be more likely to seek review of circuit court decisions, because the new Court of Appeals would increase the probability of obtaining review by a higher tribunal. The generation of more litigation would contradict a basic policy goal of Congress and the Administration.

11/ Swygert, The Proposed National Court of Appeals: A Threat to Judicial Symmetry, 51 Indiana L.J. 327, 330 (1976).

Even if the creation of a National Court of Appeals were to lessen the Supreme Court's workload, the Department of Justice has some serious concerns about the possible impact of the proposed court. As Judge Henry J. Friendly of the Second Circuit stated, establishing such a court would result in the "diminution of authority and prestige of the present courts of appeals."12/ This diminution will certainly make it more difficult to attract and retain judges of the highest stature for such courts. We are especially concerned about this because the cap on pay received by Federal Judges has made it harder than ever to persuade able people to serve. Indeed, the sharing of the Supreme Court's power to interpret the constitution and national law might even tend to dilute the prestige of the Supreme Court itself.

In some areas of law, such as tax and patents, where national uniformity serves important economic planning purposes, the proposed National Court of Appeals could serve a useful and important role in resolving inter-circuit conflicts. Nevertheless, we do not believe that the need for more frequent resolution of inter-circuit conflicts is sufficiently critical at the present time to justify creation of a National Court of Appeals. Wilfred Feinberg, Chief Judge of the Court of Appeals

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12/ Letter of Honorable Henry J. Friendly, Senior Circuit Judge, United States Court of Appeals for the Second Circuit (April 22, 1975), in II Commission on Revision of the Federal Court Appellate System, Hearings, Second Phase, 1974-75, at 1311.

for the Second Circuit, writes that there are "relatively few examples of undecided issues that are important enough to require national resolution without delay."13/ There is little evidence that the Supreme Court has refrained from resolving any significant number of inter-circuit conflicts that involve recurring issues or questions of general importance. Moreover, as Professor Charles L. Black, Jr., Henry R. Luce Professor of Jurisprudence of Yale, wrote: "Many cases of such conflict can be endured and sometimes perhaps ought to be endured while judges and scholars observe the respective workings-out in practice of the conflicting rules, particularly where the question of law is a close one, to which confident answer will in any case be impossible."14/

Indeed, much of the confusion currently existing in federal law is not caused by the Supreme Court's inability to address inter-circuit conflicts, but the lack of consensus within the Supreme Court, which has prevented clear resolution of important legal issues. We fear that the existence of a National Court of Appeals could in some circumstances create more rather than less uncertainty for the lower courts, if its opinions appeared to conflict with the Supreme Court. How, for instance, would a Federal District Court weigh a holding of the National

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13/ Feinberg, supra note 9, at 623.

14/ Black, The National Court of Appeals: An Unwise Proposal, 83 Yale L. J. 883, 898 (1974).

Court of Appeals against conflicting dicta of the Supreme Court?15/

While the Department of Justice is very concerned with the problems which this legislation seeks to address, we have concluded that creation of a National Court of Appeals would be inadvisable at this time. There are preferable ways to lessen the workload of the Supreme Court, such as elimination of mandatory jurisdiction, discussed below.

2. S. 1531, Supreme Court Jurisdiction

S. 1531 would convert the Supreme Court's mandatory appellate jurisdiction to jurisdiction for review by certiorari,

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15/ Alexander Hamilton discussed the need for control of the lower courts by a single Supreme Court during the controversy surrounding adoption of the Constitution:

> There are endless diversities in the opinions of men. We often see not only different courts but the judges of the same court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of civil justice. The Federalist Papers, No. 22, (A. Hamilton) (New Am. Lib. ed. 1961).

except in connection with review of decisions by three-judge district courts.16/ If enacted, this change would be part of a long, historical process of converting the appellate jurisdiction of the Supreme Court from being totally obligatory to being almost wholly discretionary. The first major effort by Congress to limit the burden of the obligatory functions of the Court was the Circuit Court of Appeals Act of 1891.17/ This legislation not only created a new level of courts, but also introduced the concept of discretionary review by certiorari. The burden on the Supreme Court was temporarily improved, but by 1925, long delays in the Court's docket led Chief Justice Taft to urge Congress to enact the Judiciary Act of 1925[18]/, which greatly expanded

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16/ In addition to retaining appeals from three-judge district courts, the bill does not eliminate one narrow area of appellate jurisdiction. 45 U.S.C. § 743(d) authorizes direct appeal to the Supreme Court of certain determinations of the special railroad reorganization court. This statute will be unlikely to generate significant amounts of litigation, because the major lawsuits with which that court was created to deal have been settled within the past year.

17/ 26 Stat. 826 (1891).

18/ 43 Stat. 936 (1925).

certiorari jurisdiction. In the 1970's Congress further converted the Court's remaining obligatory jurisdiction.19/

The Department of Justice believes that the changes incorporated in this legislation are long overdue, and will bring about a substantial improvement in the administration of justice in the federal courts. Justice Felix Frankfurter elucidated the several reasons that make curtailment of the mandatory appellate jurisdiction of the Supreme Court imperative:

> To resolve conflicts among coordinate appellate tribunals and to determine matters of national concern are the essential functions of the Supreme Court. But such issues appear in myriad forms and no general classification of cases can hope to forecast the specific instances deserving the Court's ultimate judgment. . . . In marking the boundaries of the Court's jurisdiction its broad categories must be supplemented by ample discretion, permitting review by the Supreme Court in the individual case which reveals a claim fit for decision by the tribunal of last resort. 20/

Chief Justice Burger has endorsed these views in stating that, "all mandatory jurisdiction of the Supreme Court that can be,

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19/ Legislation adopted in the 1970's that converted the Supreme Court's mandatory jurisdiction includes: revisions in 1970 to the Criminal Appeals Act, 18 U.S.C. 3731 (eliminating direct appeals by the United States from certain types of district court criminal decisions); the Antitrust Procedures and Penalties Act, 88 Stat. 1706 (1974) (eliminating direct appeals in cases under the antitrust laws and the Interstate Commerce Act authorized by the Expediting Act of 1903); and the repeal of 28 U.S.C. 2281 and 2282, which required the convocation of three-judge district courts to hear and determine injunctive challenges to the constitutional validity of State or Federal statutes, 90 Stat. 1119 (1976).

20/ Frankfurter and Landis, The Business of the Supreme Court, (1982), pp. 257-258.

should be eliminated by statute."[21/] The Justices have written that they "have spoken out publicly on the issue . . . stating essentially the view that the Court's mandatory jurisdiction should be severely limited or eliminated altogether."[22/]

The essential defect of the current system is that the Supreme Court is required to devote a large portion of its time deciding cases of no special importance because they qualify for review by appeal under the current statutes. In the 1976 term, for instance, appeals accounted for more than one-fourth of the cases set for oral argument and plenary consideration. Such cases frequently raise no question of general interest and would not warrant the grant of a writ of certiorari.

The current system of mandatory appellate review is the source of a great deal of confusion in the law. The court is required to review hundreds of such appeals on the merits, disposing of many in a summary fashion which often generates confusion because the relative weight to be attached to such decisions is unclear. As Justice Brennan asserted, "[v]otes to

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21/ Remarks of Chief Justice Burger at American Law Institute meeting, May 20, 1975, cited in H.R. Rep. No. 985, 95th Cong., 2d Sess. 2 (1978).

22/ See Letter from the Justices to Senator DeConcini (June 22, 1978), reprinted in Appendix I, S. Rep. No. 35, 96th Cong., 1st Sess. 15-16 (1979); see also prefatory statements on behalf of the Court of Justice Stevens regarding First Federal Savings and Loan Ass'n of Boston v. Tax Comm'n of Massachusetts, 437 U.S. 255 (1978), and Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978) reprinted in S. Rep. No. 35, 96th Cong., 1st Sess. 17 (1979).

affirm summarily, and to dismiss for want of a substantial federal question . . . are votes on the merits of the case."[23] However, in Edelman v. Jordan [24] the Court stated that summary affirmances "are not of the same precedential value" as an opinion of the Court "treating the question on the merits." In Hicks v. Miranda,[25] the Court stated that a dismissal of a challenge to the constitutionality of a state statute for lack of a substantial federal question is a decision on the merits. The precedential value of such decisions is unclear.[26] In Mandel v. Bradley,[27] the Court attempted to explain the significance to be attached to summary affirmances. It stated that an affirmance of a lower court decision on appeal affirmed only the judgment, not the reasoning of the lower court. The Court stated that "[t]he precedential significance of the summary action . . . is to be assessed in the light of all the facts in that case."[28] Thus the effect of summary dispositions of appeals is still

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23/ Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247 (1959).

24/ 415 U.S. 651, 670-1 (1974).

25/ 422 U.S. 332, 344-5 (1975). The Court noted that, "Ascertaining the reach and content of summary actions may itself present issues of real substance, and in circumstances where the constitutionality of a state statute is at stake, that undertaking itself may be one for a three-judge court." Id. at 345 n.14.

26/ See C. Wright, Law of Federal Courts 495 (2d ed. 1970).

27/ 432 U.S. 173 (1977) (per curiam).

28/ Id. at 176-177.

uncertain.[29/] The proposed legislation would eliminate the problem of determining the precedential value of summary dispositions of obligatory cases.

More importantly, the current system should be changed because it interferes with the resolution of recurrent legal questions of public importance. Mandatory appellate review interferes with the Court's ability to pass on issues at a time and in a context most conducive to the sound development of federal law. The Court should not be required to review cases in

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29/ Justice Brennan, in a concurring opinion to Mandel, described the current state of the law:

> [I]n my view, the federal and state courts should give "appropriate, but not necessarily conclusive, weight to our summary dispositions," rather than be required . . . "to treat our summary dispositions of appeals as conclusive precedents regarding constitutional challenges to like state statutes or ordinances."
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> The Court . . . effectively embraces that view, and vividly exposes the ambiguity inherent in summary dispositions and the nature of the detailed analysis that is essential before a decision can be made whether it is appropriate to accord a particular summary disposition precedential effect. After today, judges of the state and federal systems are on notice that, before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the constitutional questions presented were the same and, if they were, (b) determine that the judgment in fact rests upon decision of those questions and not even arguably upon some alternative nonconstitutional ground. The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is plausible. In other words, after today, "appropriate, but not necessarily conclusive, weight" is to be given this Court's summary dispositions.

Id. at 179-80 (citations omitted) (emphasis added).

circumstances where, for instance, the record in a case presenting an important legal issue may be unclear or the Court's ability to reach a sound decision with respect to a complex and significant issue can be enhanced by examination of subsequent decisions of several lower courts.30/ Moreover, the categories defined by the existing appeal provisions encompass broad classes of cases not all of which are of sufficient importance to merit Supreme Court review. The certiorari jurisdiction of the court, on the other hand, results in the review of cases which ought to be decided because of their importance. This point may be appreciated more fully in the context of the principal jurisdictional provisions that would be affected by S. 1531: 28 U.S.C. Sections 1257(1)-(2), 1254(2), and 1252.

Section 1257(1) authorizes review by appeal of a decision of the highest state court in which a decision could be had where a federal law is found invalid. Section 1257(2) provides similarly for review of decisions by the highest state court where the validity of "a statute of any state" is challenged on federal grounds and upheld.

The purpose of authorizing appeal in such cases is apparently to assure that the supremacy and uniformity of federal

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30/ See Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 918 (Brennan, J., dissenting from denial of certiorari); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950) (opinion of Frankfurter, J., concerning denial of certiorari).

law will be upheld. However, there is no reason to believe that the Supreme Court would fail to carry out this responsibility if given discretion to decide which cases should be reviewed in order to vindicate federal interests. In addition, this provision implies that we cannot rely on state courts to reach the proper result in such cases. As the Bork Committee stated, "This residue of implicit distrust has no place in our federal system."[31/]

Section 1257 does not restrict appeal to cases of general or unusual significance. The term "statute of any state," as used in Section 1257(2), is not confined to laws of statewide applicability, but includes municipal ordinances[32/] and all administrative rules and orders of a "legislative" character.[33/] Moreover, Dahnke-Walker Milling Co. v. Bondurant,[34/] holds that this provision does not require that the challenge rejected by the state court be to the general validity of a state law. Appeal to the Supreme Court may be taken even if the application of the state law was barred on federal grounds only in the particular facts of an individual case. In some cases, the ability of a litigant to obtain review on appeal may depend simply on his attorney's ability to describe the outcome of the

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31/ Bork Report, supra note 10, at 13.

32/ See, e.g., Coates v. City of Cincinnati, 402 U.S. 611 (1971); and Jamison v. Texas, 318 U.S. 413 (1943).

33/ See, e.g., Lathrop v. Donohue, 367 U.S. 820, 824-27 (1961).

34/ 257 U.S. 282 (1921).

case as a rejection of a federal constitutional challenge to the validity of a state law as applied.[35/]

Section 1254(2) authorizes appeal by a party relying on a state statute held by a federal court of appeals to be invalid on federal grounds. The category specified in this provision also does not define a class of cases which are always of special importance. As is the case for Section 1257, a "statute" under this provision includes municipal ordinances[36/] and administrative orders.[37/] It suffices if a state law is held to be invalid as applied under the facts of a particular case.[38/]

Section 1252 provides for direct appeal to the Supreme Court of decisions of lower federal courts holding acts of Congress unconstitutional in proceedings in which the United States or its agencies, officers, or employees are parties. Ordinarily, lower federal court decisions invalidating acts of Congress present issues of great public importance warranting Supreme Court review. There is no reason to believe that the Supreme Court would frequently refuse to grant a discretionary

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35/ See Hart & Wechsler, The Federal Courts and the Federal System, 631-40 (2d ed. 1973).

36/ City of New Orleans v. Dukes, 427 U.S. 297, 302 (1976).

37/ Public Service Comm'n v. Batesville Telephone Co., 284 U.S. 6 (1931).

38/ Dutton v. Evans, 400 U.S. 74, 76 n.6 (1970).

noted that in cases in which expedited consideration by the Supreme court is required, it is possible for the litigants to apply to the Supreme Court for a writ of certiorari before final judgment in the court of appeals, as did the government in United States v. Nixon.[39]

Section 6 of the bill deletes Section 310(b) of the Federal Election Campaign Act of 1971 (hereinafter referred to as FECA).[40] Section 310(b) currently provides that any district court decision in any action construing the constitutionality of any provision of the FECA "shall be reviewable by appeal directly to the Supreme Court." Deletion of this section would result in actions regarding the constitutionality of any provision of the act being governed by Section 310(a) of the FECA,[41] which provides that the district court "immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc."

Provisions for judicial review in the FECA are at present complicated, confusing and inefficient. In addition to

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39/ 418 U.S. 683 (1974).

40/ 2 U.S.C. § 437h(b).

41/ 2 U.S.C. § 437h(a).

Section 310, Section 801 of the FECA [42] provides means of judicial review. Section 801(b)(2)[43] states that a three-judge panel of the district court "shall have jurisdiction of proceedings, pursuant to this subsection;" with any appeal lying directly to the Supreme Court, under 28 U.S.C. § 2284. The present structure can result in different courts dealing with aspects of the same case. Judicial economy and consistency in results are best served by providing in the FECA for judicial review by the same courts under the same procedures. Therefore, the Department favors deletion of Section 310(b) of the FECA, but simultaneous amendment of Section 801(b) to conform it to the amended Section 310. In the alternative, the current provisions for a three-judge panel with direct appeal to the Supreme Court in section 801 could be retained only in the most exceptional circumstances, namely actions brought by Presidential candidates, with all other cases handled according to the procedure of the revised Section 310 of the FECA.

We do not believe that alternative broad rules of mandatory review can be devised that will assure consideration of important cases in a principled and consistent way, and still avoid the problems arising under the current system. If the discretionary review set forth in practice proves to be

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42/ 26 U.S.C. § 9011.

43/ 26 U.S.C. § 9011(b)(2).

unsatisfactory in particular areas, Congress can restore appellate review to the Supreme Court's jurisdiction.

The proposed measure will entail no additional government costs or expenditures and will permit the Supreme Court to utilize its resources in a more rational manner. For the foregoing reasons, the Department of Justice supports S. 1513, and urges its speedy enactment.

3. S. 1532, Voir Dire Amendments

S. 1532 would alter the present Federal Rules of Civil and Criminal Procedure relating to voir dire examinations. Such examinations are governed currently by the practically identical provisions of Fed. R. Crim. P. 24(a) and Fed. R. Civ. P. 47(a). These rules permit trial judges to conduct the voir dire examinations or to allow counsel to do so. At present, when the voir dire is undertaken by the court, counsel may either engage in such supplemental examination as the court deems proper or submit additional questions for the jury to the court. The scope of counsel's participation in this process is wholly within the discretion of the court under the current rules.

S. 1532 would amend the Rules to require the court to allow counsel to conduct the examination of the prospective jurors. The court could supplement counsel's examination and impose reasonable limitations on voir dire examinations.

The Notes of the Advisory Committee on Rules of Practice and Procedure to the Judicial Conference on Fed. R. Civ. P. 47(a) state that the current rules on voir dire were based on pre-existing practice which had been "found very useful by federal trial judges." The Advisory Committee also thought it desirable to have a uniform federal practice for criminal and civil cases.44/ The Department of Justice agrees with both of these points.

The Department of Justice is aware of the concerns in the bar regarding the importance of voir dire. Permitting counsel to conduct examination of prospective jurors would likely result in a more thorough examination and could help to assure maximum guarantees against juror bias. However, we do not believe that it would be best to make the changes suggested at this time. Examination of veniremen by counsel would make trials longer; increase the cost to the taxpayer in civil and criminal cases in which the government is a party; and further burden the judicial system. These costs would be incurred even though the present system works well and provides adequate guarantees against juror bias.

The assurance that defendants in criminal trials will receive an impartial hearing before the jury is especially

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44/ See Notes of the Advisory Committee on Rules of Practice and Procedure to the Judicial Conference on Fed. R. Civ. P. 24(a).

important. Under Fed. R. Crim. P. 24(a) and related case law, a federal criminal defendant is assured of an impartial jury. It has long been recognized that the court's exercise of its traditionally broad discretion over the voir dire, and the restriction of examination by or at the request of counsel, are subject to "the essential demands of fairness."45/ The courts must conduct or permit sufficient examination to provide "reasonable assurance that [a prospective juror's] prejudice would be discovered if present,"46/ and the courts must also provide a reasonable opportunity for counsel to exercise peremptory challenges in a meaningful way.47/ The District of Columbia Circuit has held that "the defense must be given a full and fair opportunity [during voir dire] to expose bias and prejudice on the part of veniremen."48/

45/ Aldridge v. United States, 283 U.S. 308, 310 (1931).

46/ United States v. Magana-Arevalo, 639 F.2d 226, 229 (5th Cir. 1981).

47/ United States v. Rucker, 557 F.2d 1046 (4th Cir. 1977); see also United States v. Baker, 638 F.2d 198 (10th Cir. 1980).

48/ United States v. Robinson, 475 F.2d 376, 380-381 (D.C. Cir. 1973). See also Fietzer v. Ford Motor Co., 622 F.2d 281 (7th Cir. 1980), where the court held that the trial court committed prejudicial error by unreasonably restricting the voir dire examination. The Court stated that defendant Ford was denied the opportunity to inquire into areas which might have uncovered grounds for challenge for cause. Moreover, the defendant was unable to exercise intelligently its peremptory challenges because of the restrictions placed on voir dire by the trial court.

Thus in our view the current system provides adequate guarantees of fairness. Moreover, practical considerations strongly support maintaining the traditional federal rule. After conducting a broad study of the federal jury system in 1960, a committee of the Judicial Conference concluded in pertinent part:

> The voir dire examination of trial jurors by the judge, together with supplemental examination, at the instance of the parties and counsel, by the judge, as provided by the above quoted rules, results in a great savings of time, and the character of the examination is thereby much improved. The Committee recommends that this practice be followed in all districts.[49]

Many commentators agree that the federal method of conducting voir dire yields a substantial savings in time when compared with other methods.[50] Some scholars have even criticized voir dire as "a cumbersome, time consuming, meaningless part of the jury trial."[51] Chief Justice Burger has called it a "major piece of litigation, consuming days or weeks."[52] Moreover, one of the major justifications for court-conducted voir

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49/ The Jury System in Federal Courts, 26 F.R.D. 409, at 467 (1960).

50/ Levit, Nelson, Ball & Chernick, Expediting Voir Dire: An Empirical Study, 44 S. Cal. L. Rev. 916 (1971).

51/ Ryan and Neeson, Voir Dire; A Trial Technique in Transition, 4 Am. J. of Trial Advocacy 523, 524 n.3 (1981). See also, Craig, Erikson, Friesen & Maxwell, Voir Dire; Criticism and Comment, 47 Den. L.J. 465 (1970); Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loy L.A. L. Rev. 247 (1973); Levit, Nelson, Ball & Chernick, supra note 45.

52/ National Conference on the Judiciary, Williamsburg, Virginia, March 12, 1971.

dire is "to remedy the parties' attempt to influence jurors."53/

I have noted that a recent newspaper article reports that jury selection in New York City trials is "out of hand" under a rule entitling lawyers, rather than the judge, to control the voir dire process.54/ Jury selection consumes up to a third of total trial time in New York City and is "a major reason for the slow pace of criminal justice."55/ The article states that in lawyer-controlled voir dire, counsel aims not only to learn about the jurors, but to "rap with them to warm them to their cause."56/ The rule proposed in S. 1532 would enable the court to impose limitations on counsel to prevent such abuses of voir dire. Nevertheless, we are concerned that the suggested change in voir dire could result in a substantial increase in the cost and time of trials in federal court, which cannot be fully justified in light of existing protection against biased jurors. Because we believe that trials are already too

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53/ Massey and Travis, Voir Dire, 62 Chic. B. Rec. 103, 109 (1980).

54/ New York Times, June 17, 1981, at page A30 ("The Editorial Notebook").

55/ Id.

56/ Id.

time-consuming and expensive, the Department of Justice has concluded that the current system should be retained.

I appreciate very much the opportunity to speak to the Committee about these important bills.

U.S. Department of Justice
Office of Legislative Affairs

RAM:JEP;rb
S. 2035

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY 25 1982

Honorable Strom Thurmond
Chairman, Committee on the
Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on S. 2035, a bill "to establish a National Court of Appeals, and for other purposes." This proposed legislation would create a National Court of Appeals to hear cases referred to it by the Supreme Court.

In many respects, this bill is similar to S.1529 introduced in the 1st session of the 97th Congress and upon which the Department of Justice testified on November 16, 1981. There are certain important differences:

(1) While the National Court of Appeals to be created by S. 1529 would have been composed of a chief judge and eight associate judges appointed by the President with the advice and consent of the Senate, the court, proposed under S. 2035, would be composed of a pool of judges selected from among the active federal appellate judges on a case-by-case basis.

(2) S. 2035 would create a Chancellor of the United States appointed by the Chief Justice of the Supreme Court from among the active judges on the circuit courts. The Chancellor of the United States would be the presiding officer of the National Court of Appeals and his duties would include responsibility for the administration of the National Court as well as assisting the Chief Justice with all of his nonjudicial functions.

(3) Under section 1271 of S. 2035, the National Court of Appeals could review cases transferred to it by the Supreme Court to determine whether or not the Supreme Court should grant certiorari. A certiorari panel would be established for this purpose.

cc: OLP

The Department of Justice's concerns, regarding the establishment of a National Court of Appeals as discussed in the testimony on S. 1529, would not be alleviated by these differences in approach. As we stated in our testimony on S. 1529, while the establishment of the National Court of Appeals would probably help to resolve some existing inter-circuit conflicts and might also assist the Supreme Court by deciding cases of lesser significance, the proposed court would inevitably create additional burdens for the Supreme Court.

The Supreme Court's responsibility to refer cases to the new tribunal could add substantially to its present burden. The Supreme Court would have to decide, in addition to whether cases should be reviewed initially by it, which cases should be referred to the National Court of Appeals. The responsibility to consider petitions for certiorari, after the National Court of Appeals has decided a case referred to it, would be a new added burden upon the court.

The Supreme Court, in addition, would have to monitor very closely the decisions of the National Court of Appeals to ensure that the latter's opinions were consistent with its views. The existence of a National Court of Appeals may also generate additional litigation. Litigants would be more likely to seek review of circuit court decisions because the existence of a National Court of Appeals would increase the probability of obtaining review by a higher tribunal. These additional burdens clearly offset the advantages which are envisioned by the creation of such a new court.

Finally, we note that the proposed National Court of Appeals proposed in S. 2035 would be headed by a Chancellor of the United States selected by and subject to removal by the Chief Justice of the Supreme Court. The Chancellor, in turn, would select the judges to sit on the National Court of Appeals under a system to be designed by the Judicial Conference of the United States. While the creation of a Chancellor of the United States may very well assist the Chief Justice by shifting a wide range of administrative chores onto the Chancellor, the oversight and control the Chief Justice would have over the new tribunal through the selection and removal power over the Chancellor could be a troubling feature of this bill.

The creation of a National Court would not reduce the caseload of the present district and circuit courts. The Department of Justice does not favor its adoption. A more salutary effort would be jurisdictional modification which would affect the flow of cases into all levels of the court system rather than this structural revision.

The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General

U.S. Department of Justice

Civil Division

4570

Office of the Assistant Attorney General *Washington, D.C. 20530*

5 NOV 1982

MEMORANDUM

TO: Mr. Jonathan C. Rose
Assistant Attorney General
Office of Legal Policy

FROM: J. Paul McGrath
Assistant Attorney General
Civil Division

SUBJECT: H.R. 7294, Omnibus Bankruptcy and Court Improvements Act

Attached are two memoranda, prepared by members of my staff, dealing with H.R. 7294. The first, prepared by J. Christopher Kohn, Director of the Commercial Litigation Branch, deals with the bankruptcy aspects of the bill. The second, prepared by Robert Kopp, Director of our Appellate Staff, discusses the proposed Intercircuit Tribunal of the United States Courts of Appeals. You may find some of the comments in these memoranda useful in developing the Department's position on the proposed legislation.

Attachments

Washington, D.C. 20530

OCT 27 1982

MEMORANDUM

TO: J. Christopher Kohn
Director,
Commercial Litigation Branch

FROM: Robert E. Kopp
Director,
Appellate Staff

RE: H.R. 7294 Intercircuit Tribunal of the United States Court of Appeals

In response to your memorandum of October 21, 1982, I am providing you with these brief comments about Title I of H.R. 7294. Because of time limits and the Appellate Staff's major focus on court of appeals issues, I am limiting these comments to Subtitle F of Title I, the proposal to create an Intercircuit Tribunal.

Subtitle F would establish an Intercircuit Tribunal of the United States Court of Appeals composed of 14-22 regular circuit judges or senior circuit judges designated by the Chief Justice of the Supreme Court for five year terms. The Tribunal, sitting in panels of seven judges, would hear and decide cases referred to the Tribunal by the Supreme Court. Cases could be referred to the Tribunal only after a court of appeals had rendered a final decision in a case, followed by the filing of a certiorari petition or a jurisdictional statement in the United States Supreme Court. The Supreme Court, after receiving a jurisdictional statement would direct the Tribunal to decide cases subject to review by appeal. The Supreme Court, after receiving the certiorari petition, would either allow the Tribunal discretion to determine whether to review the case, or, if it chose, would direct the Tribunal to decide the case. Tribunal judgments would be subject to Supreme Court review on certiorari petition. Unless modified or overruled by the Supreme

Court, Tribunal decisions would be binding on all courts of the United States, and on all other courts with respect to federal questions. The Tribunal would terminate on September 30, 1987.

My first comment about Subtitle F is that it creats another layer of court review which has at least the potential for further encumbering the federal court system and adding to litigation expenses. I recognize that the proposal is intended to alleviate the workload of the Supreme Court and improve the performance of the lower federal courts. However, the balance of the bill has other provisions which are designed to accomplish this objective. It may be more appropriate to assess the impact of these other changes, e.g., abolition of diversity jurisdiction and restriction of the Supreme Court's mandatory appellate jurisdiction before engrafting another judicial layer onto the federal court system. This point is enhanced by the fact, as I understand it, that while there has been considerable attention given to other proposals, such as creation of a National Court of Review, the Congress has not focused on the Intercircuit Tribunal concept to the same extent. So far as I know, there have been no committee hearings or reports on this proposal.

Turning to the merits of the proposal, I am troubled by the provisions for constituting the Tribunal. The Tribunal's decisions would have the same binding effect as Supreme Court decisions on courts of appeals and other lower courts. Yet its decisions will be rendered by judges appointed by the Chief Justice for five year terms. These judges will not have undergone the special rigorous scrutiny that Supreme Court justices are subjected to. Even though the current Chief Justice is highly regarded, questions are also raised as to the great powers institutionally vested in a single individual, the Chief Justice, who will be empowered to appoint the Tribunal Judges for five year terms. Moreover, although the Tribunal will be deciding cases in lieu of the Supreme Court, it will not really be a single Court. Its panels will vary among the 14 to 22 eligible Judges who make up its pool, and these judges will sit for five-year terms only. The Tribunal would seem to lack the stability and continuing character which has been the hallmark of the federal court system.

Another troubling question is the type of cases which the Tribunal will hear. The bill sets forth no standards for determining the type of cases the Supreme Court will refer to the Tribunal (or even the number of votes required for that reference). There is good reason to suppose, however, that the Supreme Court will choose to refer only statutory questions, thereby concentrating on constitutional issues alone. It is not clearly wise to create a two-tier court system for constitutional and statutory issues.

Some practical concerns may also be raised. Presumably the bill contemplates that Tribunal judges will continue to carry their workload as circuit judges on the court of appeals. The

bill does not indicate how many cases will be considered by the Tribunal. But, if it is substantial, circuit judges who are called to sit on the Tribunal may find themselves falling behind in their regular court of appeals work. This problem may be dealt with by appointing a number of senior judges to the Tribunal, but this itself entails serious concerns.

Finally, the proposal may materially add to the burdens of the Supreme Court. Since cases come to the Tribunal only after the Supreme Court refers the case to it after studying a certiorari petition or jurisdictional statement, the Supreme Court will have the burden of reading those documents, and the possibility of such references may encourage lawyers to file even more certiorari petitions and jurisdictional statements than they do now. Moreover, it will be virtually mandatory for a lawyer to file another certiorari petition after the Tribunal renders its decision given the importance of its work. The Supreme Court will then have the additional burden of studying those petitions.

In sum, while I recognize that the proposal is well-intentioned and is proposed as only a five-year experiment, it raises too many serious concerns to warrant enactment at this time.

cc: Ms. Carolyn Kuhl
Deputy Assistant Attorney General
Civil Division

Memorandum

Received
OLP
11-8, 1982
JCR
cf:SJB File: Bankruptcy
RLC

4503

Subject

Omnibus Bankruptcy and Court Improvements Act

Date NOV 05 1982

To Jonathan C. Rose
Assistant Attorney General
Office of Legal Policy

From Glenn L. Archer
Assistant Attorney General
Tax Division

On October 1, 1982, Representative Caldwell Butler introduced H.R. 7294, the Omnibus Bankruptcy and Court Improvements Act. I understand that Senator Dole, Chairman of the Subcommittee on Courts of the Senate Judiciary Committee has scheduled a hearing on November 10, 1982, at which H.R. 7294 and similar Senate amendments will be discussed. The Tax Division is primarily concerned with the proposals contained in H.R. 7294 and the Senate amendments for the creation of an Intercircuit Tribunal of the United States Courts of Appeals. We also have some concerns about the proposed procedures for appeal of bankruptcy cases.

INTERCIRCUIT TRIBUNAL

The Intercircuit Tribunal would be a national court of appeals with jurisdiction over cases referred by the Supreme Court. The court would consist of between 14 and 22 circuit judges selected by the Chief Justice of the United States, and senior circuit judges would be eligible for selection. The chief judge of the court would likewise be selected by the Chief Justice. Cases would be heard and decided by panels of seven judges. The decisions of the court would be binding on the other federal courts and with respect to federal questions would also be binding on state courts.

A case would be referred to the Intercircuit Tribunal before or after the Supreme Court acted on a petition for certiorari or an application for review by appeal. Any referred case subject to review by appeal must be heard and the Supreme Court could direct that other cases be heard. Decisions of the Intercircuit Tribunal would be subject to review in the Supreme Court by a petition for certiorari.

Under both versions of the legislation, the Intercircuit Tribunal would cease to exist on September 30, 1987.

We have the following comments on this proposal:

1. The idea of creating a national court of appeals is far from new. It was the subject of intense debate and much criticism over the last decade. The concept was opposed by several Administrations and only last year, you testified in opposition on behalf of this Administration at a hearing on S. 1529.

2. The premise underlying the proposal is that the Supreme Court is overworked. That premise, however, may not be accurate.

A. The workload of the Supreme Court in terms of docketed cases remained relatively constant during the October Terms of 1975 through 1980. The increase since the October, 1980 Term has been approximately 11 percent overall and largely represents the litigation explosion generally experienced by the courts. However, a large proportion of the petitions are patently frivolous. Indeed, almost half of the docket consists of petitions filed in forma pauperis, most of which represent prisoner petitions and last-ditch efforts in criminal cases by court-appointed counsel. 1/ In recognition of the frivolous nature of many petitions, the Office of Solicitor General in recent years has increasingly waived the filing of a memorandum in opposition. 2/

B. The experience of the Tax Division is that the Supreme Court is capable of resolving conflicts between the circuits in a timely fashion. In our view, some conflict is tolerable because of the opportunity for increased thought devoted to resolution of the issues. We do not doubt that enactment of the legislation would provide some relief by permitting the Supreme Court to shift a portion of its work to another court. The legislation would also expand the capacity of the judicial system to resolve with a degree of finality more cases than the Supreme Court can currently hear. One likely result is that pressure will exist to refer even inconsequential conflicts to the new court. Furthermore, a fundamental premise of our judicial system is that there is only one Supreme Court. Creation of a mini-Supreme Court would be a radical and controversial break with tradition which should not be taken lightly. We are not convinced that a compelling case has been made of the need for this legislation.

C. In reaching this conclusion we have taken in to account the current backlog of cases awaiting argument in the Supreme Court. The situation is unusual, and there is no way to tell whether the backlog is an abberration or the beginning of a pattern. Our skepticism about drawing any dire predictions from the current situation is based on the fact that at the same relative time in the October, 1981 Term, the Court was regularly scheduling arguments even before all of the briefs were filed. There was no backlog at all of cases waiting for oral argument. Thus, the current situation on the scheduling of arguments is a very recent development and does not realistically support the enactment of the pending measures.

D. We strongly feel that before the radical step is taken of interjecting a new court between the Supreme Court and the courts of appeal, less drastic measures should be tried. For example, H.R. 7294, the Dole amendments and a measure recently passed by the House

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1/ During the October Terms 1976 through 1981, the percentage of cases filed in forma pauperis ranged from 44% to 50.1%.

2/ While this practice has primarily been used in ciminal cases, it has been used in some civil cases as well.

(H.R. 6872) would eliminate the mandatory jurisdiction of the Surpeme Court and provide for review generally by writ of certiorari. That step would relieve some pressure on the Court. The resources of the Supreme Court (and the lower Federal courts) would also be conserved upon the enactment of the Administration's habeas corpus reform legislation (S. 2903).

Moreover, the Court in recent years has issued some summary decisions based only on the petition for certiorari, without further briefs and oral argument. See Darusmont v. United States, 449 U.S. 695 (1931); and Central Trust Co., Rochester, N.Y. v. Official Creditors' Committee of Geiger Enterprises, Inc., 102 S. Ct. 695 (1982). More frequent resort to this practice in appropriate cases, perhaps at the suggestion of the Solicitor General at the petition stage, would also lighten the overall pressure of hearing cases.

3. The suggested "cure" for the perceived overload of the Supreme Court may in practice exacerbate the problems of the Court. While many petitions have no merit whatever, a portion of the Court's docket consists of cases where the Court would likely have serious difficulty in deciding what action to take, if an optional referral is possible, and closer review of petitions would be necessary. In some instances, the difficulty would revolve around the question of which court should hear the case. In others, the controversy would entail whether the Intercircuit Tribunal should be authorized to hear a matter, where the Justices agree that it would be inappropriate for the Court to hear the case. In either event, additional time would be expended in debating the matter. Moreover, the availability of greater capacity for "final" resolution of a case would inexorably lead counsel to file a larger number of petitions filed than is currently the case. Experienced counsel are generally familiar with the standards currently applied by the Court and do not rush to file a petition which more likely than not would be denied. With the availability of added appellate capacity, we are convinced that more and more petitions will be filed in the hope that at least the case could be referred to the new court.

4. Enactment of the proposal also has the potential for creating divisiveness among the members of the courts of appeals--some judges will be more equal than others. Depending on the number of cases referred, the workload of the circuits might also be adversely affected. While we understand the rationale for having cases heard by panels of seven judges, that practice would also result in a significant expenditure of judicial resources.

5. An Intercircuit Tribunal would be another source of decisions to be reviewed by the Supreme Court. The Tribunal would be a more important court than the courts of appeal because its decisions would be binding on the federal courts. Thus, its decisions would be the subject of close scrutiny by the Supreme Court and a higher percentage of its decisions would likely be subject to subsequent review by the Court.

6. Finally, the carte blanche authority which the legislation would grant to the Chief Justice in the selection of judges for the Tribunal would be an unprecedented growth in the power accorded the Chief Justice. We fail to understand why the selection process for the second highest

court in the Federal judicial system should differ from the usual process for selection of judges--appointment by the President with the advice and consent of the Senate. Selection of the judges by the Chief Justice would admittedly facilitate dismantling of the program. However, we are convinced that despite its purported experimental nature, enactment of the legislation would make the Intercircuit Tribunal a permanent fixture in the landscape of the judicial system. Those who favor its creation will likewise favor its continuation. Thus, we do not favor abdication of the Executive's appointive power in this fashion.

In conclusion, the Tax Division does not favor creation of an Intercircuit Tribunal. We urge that your testimony before the Subcommittee on Courts of the Senate Judiciary Committee include a discussion of the proposal and recommend against its enactment.

BANKRUPTCY APPEALS

Under the Bankruptcy Act, appeals from decisions of the bankruptcy courts were taken to the district courts. During consideration of the Bankruptcy Reform Act of 1978, the initial House version of the legislation provided that bankruptcy judges would be appointed under Article III and appeals from decisions of the bankruptcy courts would be taken directly to the courts of appeals. The initial Senate-passed version not only rejected Article III status for bankruptcy judges, but also provided that appeals would be taken in the first instance to the district court. The rationale for retention of this procedure was described as follows (S. Rep. 95-989, 95th Cong., 2d Sess. at 20):

> The initial appeals to the district court will aid in the expeditious processing of appeals and will not increase costs to the litigants. It will also prevent the overburdening of the appellate courts.

Retention of appeals at the district court was suppported by the Judicial Conference. See Bankruptcy Reform Act of 1978, Hearings before the Senate Committee on the Judiciary, Subcommittee on Improvements in Judiciary Machinery, 95th Cong., 1st Sess. pp. 413-418 (1977). The judges representing the Judicial Conference testified that appeals to the courts of appeals would result in lengthy delays to the detriment of the litigants and emphasized the adverse impact of such appeals on the steadily increasing dockets of the courts of appeals.

The Bankruptcy Reform Act of 1978 ultimately provided for appeals to be taken initially to the district court or at the option of the circuit council to an appellate panel of bankruptcy judges. The litigants could also stipulate that an appeal would be taken directly to the court of appeals.

The pending legislation would provide that appeals from decisions of the bankruptcy courts would be taken directly to the courts of appeals, except in those circuits where the circuit council decided to provide for appellate panels of bankruptcy judges. Under the current system, the appellate panel procedure is used in the First and the Ninth Circuits. According to estimates of the Bankruptcy Division of the Administrative

Office of the United States Courts, the appellate panels in the Ninth Circuit alone heard over 500 appeals during the fiscal year ending September 30, 1982.

The Tax Division believes that retention of an intermediate appellate court in bankruptcy matters is important. We would expect that if the legislation is enacted in its present form, a number of other circuits would opt to create appellate panels, rather than to have the appeals now heard by district courts routed directly to the courts of appeals. According to information from the Administrative Office, between 2,700 and 2,800 appeals during fiscal 1982 were taken to the district courts and appellate panels--approximately 10 percent of the number of appeals filed in the courts of appeal in all cases. Direct appeal to the courts of appeals would clearly have an adverse impact on the courts of appeals, at a time when filings in those courts are continuing to escalate. Thus, we view retention of the appellate panel procedure as essential. Indeed, we believe that the Department should urge an amendment to the legislation to require the circuits to create appellate panels.

cc: Solicitor General Rex E. Lee
Assistant Attorney General Robert A. McConnell
Assistant Attorney General J. Paul McGrath

U.S. Department of Justice

Office of Legal Policy

Washington, D.C. 20530

MEMORANDUM November 9, 1982

TO: Jonathan C. Rose
Assistant Attorney General

FROM: David J. Karp

SUBJECT: The Intercircuit Tribunal Proposal

The Butler bankruptcy package contains a proposal to create an Intercircuit Tribunal of the United States Court of Appeals. The proposal would create for a five year trial period an Intercircuit Tribunal which would decide cases referred to it by the Supreme Court and render nationally binding decisions. The Tribunal would issue a report and go out of existence after five years, unless Congress decided at that point to continue it.

The Tribunal would be composed of between 14 and 22 judges assigned by the Chief Justice from the regular courts of appeals for five year terms. The Tribunal would hear and decide cases in seven-judge panels.

We have received a communication from the Civil Division criticizing the Intercircuit Tribunal proposal 1/ and expect to receive a similar communication from the Tax Division. The purpose of this memorandum is to provide you with background information on the proposal and a run-down of its pro's and con's.

I. BACKGROUND OF THE PROPOSAL

The Intercircuit Tribunal proposal originated as H.R. 4762, a bill sponsored by Rep. Kastenmeier and co-sponsored by

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1/ The Civil Division comments are under the name of J. Christopher Kohn, Director of the Commercial Litigation Branch. They were sent to us, along with other comments on the bankruptcy package, under a cover memo by Assistant A.G. McGrath, which stated that we might "find some of the comments in these memoranda useful in developing the Department's position on the proposed legislation."

Representatives Rodino, Railsback, and Butler. 2/ There is no Senate counterpart. Quite similar proposals have been advanced by a number of legal scholars or writers, including Judge Leventhal 3/ and Lloyd Cutler. 4/ The Chief Justice apparently favors the idea:

> This year, in the 97th Congress, Representative Robert Kastenmeier introduced a bill entitled the Intercircuit Tribunal of the United States Courts of Appeals Act. The bill is designed, among other things, to lighten the caseload of the Supreme Court and to provide an appellate tribunal for important cases which the Supreme Court simply cannot review given its present caseload. A Senate measure, the National Court of Appeals Act of 1981 introduced by Senator Heflin, seeks in a different way to achieve similar goals. 5/

The Administration has not taken a position on H.R. 4762, but we have opposed other proposals of a more or less similar character. We opposed S. 1529 -- on which you testified -- which would create a National Court of Appeals. S. 1529 differs from H.R. 4762 in that the judges of its National Court of Appeals would be permanently appointed, rather than assigned temporarily from the circuit courts. We also opposed S. 2035, which was closer to H.R. 4762 in that the judges of the national court it contemplated would have been drawn from the circuit courts. Both earlier bills (S. 1529 and S. 2035) differed from the Intercircuit Tribunal proposal in that they contemplated permanent arrangements rather than an experiment of limited duration.

2/ Kastenmeier's staff informs me that the bill was drafted by Mike Remington of the Legislative Affairs Division of the Administrative Office of the Courts, based on a proposal advanced by Dan Meador at a Williamsburg Conference a few years ago.

3/ See Leventhal, A Modest Proposal for a Multi-Circuit Court of Appeals, 24 Am. U. L. Rev. 881 (1975).

4/ See Cutler, "Help for High Court," N.Y. Times, Nov. 1, 1982, at A-19.

5/ W. Burger, 1981 Year-End Report on the Judiciary 27. See also N.Y. Times, June 4, 1975, at 17 (report of favorable comment by Chief Justice on national court concept, with endorsement of idea that it be temporary and that its judges be drawn from sitting federal judges).

II. ARGUMENTS FOR THE PROPOSAL

The arguments for the proposal are straightforward. The statements of a majority of the Justices over the past few months make it clear that the Supreme Court has a serious workload problem. The existence of the Intercircuit Tribunal would enable the Court to refer many cases which are not of the utmost importance to the nation, but which it now feels obliged to take because there are no other means of achieving national uniformity. This would relieve the Court's overload, and afford it more time for study and reflection in the cases which it does decide.

The second argument for the proposal is that it would increase the consistency, uniformity, and predictability of federal law by allowing a larger number of nationally binding decisions to be rendered. There are currently 64 permanent courts 6/ whose divergent interpretations of federal law can be reconciled by no means other than Supreme Court review. This sometimes results in significant geographic divergences in federal law which may remain unresolved for many years because of the Supreme Court's limited capacity. Opponents of national court proposals have asserted in response that the overall problem is not too bad, and that conflicts are concentrated in a few areas of law, so that any required corrective measures could be confined to providing unified appellate mechanisms in those limited areas.

III. ARGUMENTS AGAINST THE PROPOSAL

The opponents of the Intercircuit Tribunal and similar earlier proposals have been prolific. This section is a compendium of objections (15 of them to be specific) with accompanying responses or commentary. They are drawn from various sources, and I have tried in particular to address all the issues raised in the Civil Division memo. The objections are set out in four categories: objections relating to the effect of the proposal on the workload of the Supreme Court and other courts; objections to the method of assignment to, or to the design of, the Tribunal; objections relating to the general effect of the Tribunal on adjudication or litigation; and miscellaneous objections.

A. Effects on Workload

Objection 1: Cases referred to the Tribunal would routinely be brought back to the Supreme Court by the litigants following a decision. Given the importance and nationally binding character of the Tribunal's decisions, the Supreme Court would have to monitor

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6/ The eleven regional circuit courts of appeals, the Court of Appeals for the D.C. Circuit, the Court of Appeals for the Federal Circuit, the 50 state supreme courts, and the Supreme Court of Puerto Rico.

and review these decisions closely to ensure correctness and consistency with the Court's philosophy. Hence, the presence of the Tribunal would have the perverse effect of increasing the Supreme Court's workload.

Comment: There is no reason to think so. It is unlikely that the Supreme Court would often review or pay much attention to cases coming back to it from the Tribunal, since these would be cases that the Justices had already decided were not important enough to warrant their personal attention.

In any event, there is nothing in the bill that would require reference of cases to the Tribunal. The Justices are not stupid. If they found that referring certain types of cases, or any cases, to the Tribunal was counterproductive in terms of workload, then they could simply refrain from making such referrals.

Objection 2: Currently, the Justices must only decide whether to grant or deny a certiorari petition. If this proposal is enacted, they will have to make the more difficult and time-consuming decision of whether to grant review, deny review, or refer the case. Hence, enactment of this proposal would perversely increase the Supreme Court's workload.

Comment: There is no reason to think so. The current options are to deny or grant. The new range of options would be to deny, grant or refer. It is not apparent why the latter decision should be any more difficult or time-consuming than the former.

Objection 3: More applications for review will be filed with the Supreme Court, since the possibility of a reference to the Intercircuit Tribunal will increase the likelihood that further review will be secured by doing so. This will perversely increase the Supreme Court's workload, though the proposal is meant to reduce it.

Comment: This is valid, up to a point. If the likelihood of securing further review is increased, more applications for review will be made. For example, the Solicitor General would more frequently be able to grant requests from other executive agencies to seek review of bad or conflicting circuit court decisions affecting their programs, where now such requests must be denied because the cases presented do not reach the threshold of importance required for asking the Justices to devote their limited time to a case. In general, a reform that can reduce the number of cases the Court must decide on the merits seems desirable, even if it

means some extra work in screening applications for review, since the work involved in screening can be largely farmed out to clerks (and presently is), while the work involved in deciding cases on the merits can be delegated only to a much more limited degree.

Objection 4: There are other proposals in the bankruptcy package which could reduce the Supreme Court's workload, such as abolition of mandatory appeals to the Supreme Court and abolition of diversity jurisdiction. We should wait and see what effect they have before adding another judicial layer to the federal court system.

Comment: This is valid, up to a point. Abolition of mandatory appeals would reduce the Supreme Court's workload, reducing the force of the work-overload argument for creating the Tribunal. It is unclear how much effect abolishing diversity jurisdiction would have. Diversity cases do not appear to be a large part of filings in the Supreme Court, and very few are taken. None of the other court reform measures in the bankruptcy package would affect the Supreme Court's workload.

The objection is misleading in its suggestion that the Intercircuit Tribunal proposal could be tried out at a later point if other pending measures did not resolve the Supreme Court's workload problem. Realistically, experience with court reform legislation indicates that a proposal of this sort will never be enacted if it does not pass as part of the bankruptcy package.

Objection 5: Presumably the bill contemplates that the judges appointed to the Tribunal will retain their full workload on the circuit courts. If a substantial number of cases are referred, they could fall behind in their regular work.

Comment: There is nothing in the bill to support this interpretation. The work of the Tribunal would be more important than that of any individual court of appeals. The judges of the Tribunal should accordingly have their responsibilities as judges of the courts of appeals reduced to the extent necessary. The effect of this on the work capacity of the courts of appeals is a factor to be considered by the Chief Justice in deciding on how many judges, and what judges, to assign to the Tribunal, and a factor to be considered by the Supreme Court in deciding on how many cases to refer.

In the long run, the existence of the Tribunal should reduce the workload of the courts of appeals. It would give nationally binding decisions on issues which would otherwise be repetitively litigated in different circuits.

B. Assignment and Design

Objection 1: The proposal vests overly great power in the Chief Justice, who will have undivided authority to appoint the Tribunal.

Comment: This follows the normal practice regarding assignments to special courts and other temporary assignments of judges, which are made by the Chief Justice. Assignment to the Tribunal, however, differs in character and importance from other temporary assignments, and this objection may have merit as an abstract point concerning the design of the Tribunal. For example, a good case could be made for having the Supreme Court appoint the Tribunal, rather than the Chief Justice individually. The utility of the Tribunal will depend on the Court's willingness to refer cases to it, which will in turn depend to some extent on all the Justice's confidence in the judges on it.

Notwithstanding the force of this objection as an abstract point, the method of assignment proposed seems desirable under present practical circumstances. We know the Chief Justice and his propensities, and can feel confident that he will generally appoint highly capable judges who share our common philosophy of judicial restraint. Questions concerning the optimal method of assignment in the abstract would more appropriately be raised at the end of the five-year trial period when the continuation and long-term character of the Tribunal are being considered.

Objection 2: The decisions of the Tribunal would have the same nationally binding effect as those of the Supreme Court, but its judges would not be subjected to the special rigorous scrutiny Supreme Court Justices receive at the time of their appointment.

Comment: This is true, but it is also true that the Tribunal's decisions will not be as important as those of the Supreme Court. Presumably, the Court will keep the most important cases for itself. In any event, the judges of the Tribunal should be at least as well qualified as the other circuit judges and the state judges who would otherwise collectively have the final say on the questions of federal law which the Supreme Court would leave undecided if it did not have the Tribunal to refer them to.

In general, it is not the most outstanding judges who are appointed to the Supreme Court. A variety of practical and political considerations affect the selection of Justices. Hence, there are many circuit judges who are equal or superior to many Supreme Court Justices. Judge Friendly is an obvious contemporary example; Judge Learned Hand is another from a

little farther back in history. One potential benefit of the Intercircuit Tribunal proposal is that it will allow a more important use to be made of such judges' abilities.

Objection 3: While the Tribunal will be deciding cases in lieu of the Supreme Court, it will not be a fully unified court. It would lack the stability and continuing character which have been the hallmark of the federal court system.

Comment: This objection seems to rest on a false comparison. The question is not whether the Supreme Court or the Intercircuit Tribunal will decide issues which the Court has no time for. Rather, the question is whether such issues will be decided by an Intercircuit Tribunal or left to the conflicting decisions of 64 state, territorial and federal courts. If the concern expressed is for the coherency, consistency, and stability of federal law, there is really no comparison between the two arrangements.

The limitation of tenure on the Tribunal to five years is dictated by the fact that the Tribunal is only established for a five-year trial period. Congress may prefer a somewhat longer term if the Tribunal is later set up on a permanent basis. Further stability of membership would result from re-appointment of some judges to successive terms and the staggering of turnover, which can be achieved by design and would in any event result in the long run from premature resignations followed by new appointments.

The stability and continuing character of the federal courts referred to in the objection is difficult to discern. A typical circuit court hears cases in shifting three-judge panels with occasional en bancs. The panels are drawn from a pool consisting of between 4 and 23 active judges, roughly half that number of senior judges, and an indeterminate number of district judges and judges from other circuits who pop in and out of the court on temporary assignments. The Intercircuit Tribunal, by contrast, would consist during the trial period of a fixed group of between 14 and 22 circuit judges who would hear cases in 7 judge panels. In terms of stability, the Tribunal compares favorably with the typical court of appeals.

C. Effect on Adjudication and Litigation

Objection 1: The precedential effect of the Tribunal's decisions will be problematic. For example, what happens if a lower court is presented with a situation in which a holding of the Tribunal conflicts with dictum in a Supreme Court decision?

Comment: This is a false problem. The bill states that the decisions of the Tribunal on questions of federal law are binding on all other courts, unless overruled by the Supreme Court. Hence, the relationship of other courts to the Tribunal is the same as the normal relationship of any inferior court to a superior court by whose decisions it is bound. The specific case posed of a perceived conflict between Supreme Court dictum and Tribunal holding breaks down into two sub-cases:

In the first, the Supreme Court decision precedes the allegedly inconsistent Tribunal decision. In realistic terms, this is simply a situation in which a lower court disagrees with the Tribunal's reading of Supreme Court precedent. The lower court is not free to disregard the Tribunal's decision, but must follow it, just as a district court is obliged to follow its court of appeals' reading of Supreme Court precedent, even if it would have arrived at a different conclusion. If the rule were otherwise, creation of the Tribunal would not achieve its purpose of increasing the uniformity of federal law by enlarging the number of nationally binding precedents.

In the second, the Supreme Court decision comes after the ostensibly inconsistent Tribunal decision. This too does not differ in principle from the normal questions dealt with by inferior courts in applying the decisions of courts above them. The problem posed would be the same problem faced by a district court in deciding whether earlier decisions of its court of appeals or the Supreme Court have been implicitly overruled by their later decisions.

Objection 2: The Supreme Court will probably only refer statutory questions to the Tribunal, spending all or most of its own time on Constitutional issues. We should not have a two-tier system for Constitutional and statutory issues.

Comment: It is plausible that the Court will not refer many of the Constitutional cases it currently hears to the Tribunal. Since the Court is currently overloaded, it will probably refer some of the statutory cases it now decides. Hence, creation of the Tribunal should raise the proportion of Constitutional cases in the cases decided by the Supreme Court. There is, however, no reason to think that the Supreme Court will not continue to decide the most important statutory cases itself.

It is not apparent why more of a focus on Constitutional cases by the court is undesirable. The Court's capacity is finite; if it decides to hear more statutory cases then it must consider fewer Constitutional questions, or at least must decide them with

more limited study, reflection and deliberation. The objection seems to call for withholding from the Court an alternative mechanism for getting nationally binding decisions in statutory cases, so it will feel obliged to decide more statutory cases at the expense of Constitutional adjudication. Stated in those terms, the objection does not seem very cogent.

Objection 3: Divergent views among the circuits are not necessarily bad. The ultimate decision may be sounder if there is first an airing of different views and approaches in the lower courts. The exploration of alternatives could be cut off prematurely by decisions of the Intercircuit Tribunal in some cases.

Comment: Assuming that keeping the law uncertain for a while among the lower courts may sometimes have value, there is nothing in the proposal that would jeopardize that value. If the Court believed that an issue presented would benefit from further examination in the lower courts, it could deny review rather than refer the case. Similarly, the Intercircuit Tribunal could deny review of a case on those grounds, unless the Supreme Court had directed it to make a decision.

Objection 4: The proposal would create another layer of review, increasing the expense and complexity of federal litigation.

Comment: It is difficult to see how this could result. The Intercircuit Tribunal would not be an intermediate appellate court which must be passed through on the way up to the Supreme Court. Rather, it would be a mechanism which would provide the Supreme Court with an alternative to denying review completely and leaving the issue presented to the conflicting decisions of the various circuits and the various state courts. The Tribunal could be expected to reduce the complexity and expense of litigation at both the state and federal levels by providing an early authoritative resolution of many issues which would otherwise be litigated repetitively in the various circuits and states.

Objection 5: The creation of the Tribunal would produce a quandary for the Solicitor General's office. If review is sought in cases in which it would not be sought currently, that would dilute our credibility in asserting that a case warrants review and reduce the likelihood that the cases we consider truly important will stand out and be decided by the Court itself. But if we continue our current certiorari practice, we will not be taking advantage of the increased capacity created by the Tribunal.

Comment: This could easily be handled by differentiating between cases of the utmost importance which we think the Court itself should hear, and those which we think could appropriately be referred. The differentiation could be indicated by a statement of the preferred treatment in filings with the Court.

D. Miscellaneous Objections

Objection 1: The Intercircuit Tribunal proposal has not been sufficiently studied. There have been no Congressional hearings or reports on it.

Comment: The general problem with court reform measures is not that they are studied insufficiently, but that they are studied forever and nothing is done. This specific proposal has not been studied much, but there has been extensive study and consideration of earlier proposals of a similar character. Further study might shed some additional light on the details of this proposal, but would not bring out anything essentially new.

Objection 2: Large reforms of this sort invariably give rise to unforeseeable problems. We should not undertake such a drastic measure unless forced to do so by an unbearable crisis.

Comment: Major reforms are as likely to produce unforeseen benefits as unforeseen harm. This is really an objection to doing anything new of a significant nature unless one's back is to the wall. The outlook it reflects does not seen very sensible. The time to explore remedial measures is before the crisis has arrived.

Even if a critical problem is set up as the criterion for making a major reform, the public remarks of the Justices in the past few months and the Supreme Court's recently developed backlog suggest that the Court's caseload may now pose such a problem.

IV. CONCLUSION

My general reaction to the objections to the Intercircuit Tribunal proposal is that it would be possible to construct a comparable list of hypothetical problems with any important proposed reform, but that such perceived difficulties are usually worked out without too much trauma once a reform has been implemented. For example, a similar laundry list of difficulties could have been proposed (and probably was) to the initial proposal to create the circuit courts of appeals, and to the proposal to finally eliminate the old circuit courts.

On the positive side, the Tribunal could enable the Supreme Court to get its workload under control. I do not see

anything else on the horizon which might have that effect. The elimination of mandatory appeals will only provide a temporary respite. I also think the Intercircuit Tribunal proposal is justified by its potential value in enhancing the uniformity of federal law.

Finally, the scales of risk and potential benefit are not balanced in relation to this proposal. If the Tribunal does not work out, it will lapse after five years with no long-term harm done. But if it is not created now, it is unlikely that there will be an opportunity to try it out at any later point.

U.S. Department of Justice

Office of Legal Policy

Washington, D.C. 20530

MEMORANDUM November 9, 1982

TO: Jonathan C. Rose
Assistant Attorney General

FROM: David Karp

SUBJECT: Supplementary Remarks on Tax Division Objections to Intercircuit Tribunal Proposal

I received the Tax Division's memorandum opposing the Intercircuit Tribunal after completing my principal memorandum on the subject. I am pleased to find that I anticipated most of the Tax Division's objections in the earlier memorandum. Only a few issues appear to call for further comment:

First, the Tax Division argues that the Supreme Court may not currently have a workload problem. I did not anticipate this objection, because it did not occur to me that anyone could seriously maintain it. The Justices have made it clear in their public statements that they are overloaded. They are in a better position to know than the Tax Division.

Second, I would reiterate my point that there is no reason to believe that a choice among three options in considering applications for review (grant, deny, or refer) is any more difficult or time-consuming than a choice among two options (grant or deny). Indeed, situations can readily be imagined in which it would be easier. Suppose a Justice regards a case as marginal in terms of importance and available time resources for consideration by the Court. If the choices are limited to granting review or leaving the issue presented to the conflicting decisions of lower courts, much study, reflection and comparison with other pending applications for review may be required in reaching a decision. But reference to the Intercircuit Tribunal would provide a readily adopted third option for such cases. The same point applies to collective decisions of the Court -- there is no reason to think that a three-option choice would generally be more difficult than the current two-option choice, and situations can be imagined in which it would clearly be easier. For example, suppose 2 or 3 Justices feel that there is a strong need for a nationally

uniform rule on a certain issue, 2 or 3 feel that there is not, and the remainder are undecided. Extensive discussion and argument might currently be required to reach a decision in such a case, but referral to the Tribunal would provide an easy third option which all might readily agree to. Hence, this objection is at best speculative.

Third, the Tax Division objects that the proposal could create divisiveness in the courts of appeals, by placing the judges on the Tribunal above the other circuit judges. This objection seems to rest on a sort of radical egalitarianism which is somewhat surprising, coming from a member of this Administration. It is appropriate that circuit judges of outstanding capabilities be given more important responsibilities and heightened recognition.

Fourth, the Tax Division suggests that Presidential appointment is preferable to selection by the Chief Justice, and argues that acquiescence in the proposed mode of selection would constitute an abdication of the Executive's power of appointment. However, selection for the Intercircuit Tribunal is a temporary assignment, not an appointment. The Chief Justice currently handles all assignments to special courts and other temporary assignments. As my earlier memorandum suggested, a departure from this normal practice may be justified in connection with the Intercircuit Tribunal, but selection by the Chief Justice is likely to produce results we will be satisfied with, and would probably be less controversial at the present time than other approaches. The proper time to suggest changes in the selection process would be at the end of the five-year trial period, when the permanent character of the Tribunal is being considered.

Finally, the Tax Division expresses the view that the Tribunal will necessarily become permanent, even though advanced as an experiment, because "[t]hose who favor its creation will likewise favor its continuation." This conclusion seems wholly unwarranted. The bill provides that the Tribunal will automatically go out of existence after five years. Its proponents will have the burden of persuading Congress to enact legislation continuing or renewing it at that point.

The bill, H.R. 7294, specifically provides that judges in the bankruptcy division could be assigned non-bankruptcy matters, or could be designated to sit on other courts, only to the extent that this would not impair the expeditious determination of bankruptcy matters. This assures that the determination of bankruptcy matters will not be affected by the backlog of other cases pending in the district. However, to the extent that bankruptcy matters do not require the full time of the judges in the district's bankruptcy division, sound principles of judicial administration and economy require that those judges should be available to hear other cases and reduce the backlog of other civil and criminal matters in the district, or in other districts. By the same token, where the docket of other district judges permits, they should be available for assignment to hear bankruptcy matters as necessary to ease a backlog of cases in the bankruptcy division of a district court.

Allowing this flexibility of assignment, of both bankruptcy and non-bankruptcy cases within each district, under the general management of the chief judges of the district and circuit, we feel, is the only practical and common sense result. The failure to provide for this flexibility can only result in inefficiencies and judicial diseconomies in many if not most judicial districts.

Indeed, we note that H.R. 6978 as reported by the House Judiciary Committee also provides for flexibility of assignment in the context of separate bankruptcy and district courts. That bill provides for the designation of bankruptcy judges to sit on the district court, and vice versa. We support this provision, although we feel that the bankruptcy division approach is an even better means of promoting judicial economy.

5. Do you favor a proposal for the establishment of the Intercircuit Tribunal, a feature of the Butler bill and the Senate amendment package?

Response: These bills would create for a five-year trial period an Intercircuit Tribunal, composed of circuit judges temporarily assigned from the Courts of Appeals to hear and render nationally binding decisions in cases referred to it by the Supreme Court. This proposal, initially introduced as H.R. 4762, is similar to other proposals advanced by a number of legal writers. */

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*/ See Leventhal, A Modest Proposal for a Multi-Circuit Court of Appeals, 24 Am. U. L. Rev. 881 (1975); Cutler, "Help for High Court," N.Y. Times, Nov. 1, 1982, at A-19.

We do not believe that a sufficient case for this type of significant alteration of the federal judicial system has been made at this time. However, we note that this might be an appropriate subject for consideration by the proposed Federal Courts Study Commission, if such a commission is created as provided in the bills.

6. What will happen, in your view, should the Congress fail to meet the December 24th deadline imposed by the Supreme Court in the Northern Pipeline case? Is it reasonable to expect that the Court would grant an additional extension of its stay?

This is a subject I have discussed at some length in Part I of my prepared statement and in my oral remarks. As I stated at that time, the plurality and concurring opinions in the Northern Pipeline case have left many important questions unanswered, and the extent to which the bankruptcy courts and the district courts will be able to adjudicate bankruptcy matters after December 24 is unclear. Some have, indeed, questioned whether any court will have jurisdiction over bankruptcy matters after that date.

It is likely that, if presented with the issue at that time, the courts ultimately will hold that the district courts would retain jurisdiction over bankruptcy matters. We believe that the Supreme Court's Northern Pipeline decision only invalidated the grant of jurisdiction to the bankruptcy courts in 28 U.S.C. § 1471(c), and did not invalidate the grant of jurisdiction to the district courts in § 1471(a) and (b). Moreover, 28 U.S.C. § 1334 currently provides that "[t]he district courts shall have original jurisdiction * * * of all matters and proceedings in bankruptcy." */

However, the conclusion that the district courts would retain bankruptcy jurisdiction, and the scope of that jurisdiction, are not free from doubt. The permissible scope of district court jurisdiction over bankruptcy matters would be subject to substantial litigation before it could be firmly settled.

Furthermore, there are serious questions whether significant portions of the district courts' broad bankruptcy

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*/ Although § 1334 was amended by § 238(a) of the 1978 Bankruptcy Reform Act, 92 Stat. 2668, to limit district courts to appellate bankruptcy jurisdiction, those amendments do not take effect until April 1, 1984. See § 402(b) of the Act, 92 Stat. 2682.

97TH CONGRESS
1ST SESSION

H. R. 4762

To establish an Intercircuit Tribunal of the United States Courts of Appeals, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 15, 1981

Mr. KASTENMEIER (for himself, Mr. RODINO, Mr. RAILSBACK, and Mr. BUTLER) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To establish an Intercircuit Tribunal of the United States Courts of Appeals, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Intercircuit Tribunal of the United States Courts of Appeals Act".

ESTABLISHMENT OF TRIBUNAL

SEC. 2. (a) Part I of title 28, United States Code, is amended by inserting immediately after chapter 3 the following new chapter:

"CHAPTER 4—INTERCIRCUIT TRIBUNAL OF THE UNITED STATES COURTS OF APPEALS

"Sec.
"61. Establishment and composition of Intercircuit Tribunal; sitting panels.
"62. Principal office and terms.
"63. Seal.
"64. Sessions.

"§ 61. Establishment and composition of Intercircuit Tribunal; sitting panels

"(a)(1) There shall be an Intercircuit Tribunal of the United States Courts of Appeals which shall be composed of not less than fourteen and not more than twenty-two circuit judges who are in regular active service or who are senior judges. The Chief Justice shall designate each judge to serve on the Tribunal for a period of not more than five years from the date of such designation. The Chief Justice shall designate one of the judges serving on the Tribunal as presiding judge of the Tribunal.

"(2) Cases and controversies shall be heard and determined by sitting panels, composed of seven judges on each panel, designated by rule of the court from among judges serving on the Intercircuit Tribunal, except that no two judges from the same circuit may be designated to serve on a sitting panel at the same time, and judges shall be designated to serve on sitting panels in such a manner that all of the judges on the Tribunal hear and determine cases that are representative of all types of cases reviewed by the Tribunal. When the presiding judge of the Tribunal is not a member of

a sitting panel, the judge on the sitting panel who is senior in service shall preside over that panel.

"(b) Rules of procedure shall be promulgated and published by vote of a majority of the full membership of the Intercircuit Tribunal before any cases are heard.

"(c) In the event of the death, resignation, or disability of any judge designated under subsection (a), the Chief Justice shall, subject to the provisions of subsection (a), fill the vacancy for the remainder of the five-year period for which such judge was designated to serve.

"§ 62. Principal office and terms

"The principal office of the Intercircuit Tribunal of the United States Courts of Appeals shall be in the District of Columbia, but the Tribunal may hold court at such times and places within the United States as the Tribunal may fix by rule.

"§ 63. Seal

"The Intercircuit Tribunal of the United States Courts of Appeals shall have a seal which shall be judicially noticed.

"§ 64. Sessions

"The time and place of the sessions of the Intercircuit Tribunal of the United States Courts of Appeals shall be prescribed by rule of the court.".

(b) The analysis of part I of title 28, United States Code, is amended by inserting immediately after the item relating to chapter 3 the following new item:

"4. Intercircuit Tribunal of the United States Courts of Appeals ..... 61".

OFFICERS AND EMPLOYEES

SEC. 3. (a) Part III of title 28, United States Code, is amended by inserting immediately after chapter 47 the following new chapter:

"CHAPTER 48—INTERCIRCUIT TRIBUNAL OF THE UNITED STATES COURTS OF APPEALS

"Sec.
"731. Clerk and employees.
"732. Marshal and bailiffs.

"§ 731. Clerk and employees

"(a) The Intercircuit Tribunal of the United States Courts of Appeals may appoint a clerk who shall be subject to removal by the Tribunal. The Tribunal may appoint or authorize the appointment of such other officers and employees in such number as may be approved by the Director of the Administrative Office of the United States Courts.

"(b) The officers and employees of the Tribunal shall be subject to removal by the Tribunal or, if the Tribunal so determines, shall, with the approval of the Tribunal, be subject to removal by the clerk or other officer who appointed them.

"(c) The clerk shall pay into the Treasury all fees, costs, and other moneys collected by the clerk and shall make returns thereof to the Director of the Administrative Office of

the United States Courts under regulations prescribed by the Director.

"§ 732. Marshal and bailiffs

"The Intercircuit Tribunal of the United States Courts of Appeals may request the services of the marshal of the court of appeals in the judicial district in which the Tribunal is sitting. The marshal shall attend the Tribunal at its sessions, take charge of all property of the United States used by the Tribunal or its employees, and perform such other duties as the Tribunal may direct. The marshal, with the approval of the Tribunal, may request necessary bailiffs from the court of appeals which the marshal serves. Such bailiffs shall attend the Tribunal, preserve order, and perform such other necessary duties as the Tribunal or the marshal may direct.".

(b) The analysis of part III of title 28, United States Code, is amended by inserting immediately after the item relating to chapter 47 of such title the following new item:

"48. Intercircuit Tribunal of the United States Courts of Appeals ..... 731".

JURISDICTION AND REVIEW

SEC. 4. (a) Chapter 81 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1259. Referral to Intercircuit Tribunal of the United States Courts of Appeals

"(a) After granting or denying certiorari or noting probable jurisdiction of an appeal in any case before it, or while an application for review of a case by appeal or by writ of certiorari is pending in the Supreme Court, the Supreme Court may refer any such case to the Intercircuit Tribunal of the United States Courts of Appeals. The Supreme Court shall direct the Intercircuit Tribunal of the United States Courts of Appeals to decide any case so referred which is subject to review by appeal, and the Supreme Court may direct the Tribunal to decide any other case so referred.

"(b) Any judgment of the Intercircuit Tribunal of the United States Courts of Appeals, in any case referred to the Tribunal under subsection (a), may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any such case before or after rendition of judgment or decree by the Tribunal.".

(b) Part IV of title 28, United States Code, is amended by adding immediately after chapter 81 of such title the following new chapter:

"CHAPTER 82—INTERCIRCUIT TRIBUNAL OF THE UNITED STATES COURTS OF APPEALS

"Sec.
"1271. Jurisdiction.
"1272. Finality of decisions.

"§ 1271. Jurisdiction

"The Intercircuit Tribunal of the United States Courts of Appeals shall have jurisdiction of cases referred to the Tribunal by the Supreme Court.

"§ 1272. Finality of decisions

"(a) The Intercircuit Tribunal of the United States Courts of Appeals may deny review in any case referred to the Tribunal by the Supreme Court which is subject to review by writ of certiorari, unless the Tribunal is directed by the Supreme Court to decide the case.

"(b) Unless modified or overruled by the Supreme Court, decisions of the Intercircuit Tribunal of the United States Courts of Appeals shall be binding on all courts of the United States and, with respect to questions arising under the Constitution, laws, or treaties of the United States, on all other courts.".

(c)(1) The analysis of chapter 81 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"1259. Referral to Intercircuit Tribunal of the United States Courts of Appeals.".

(2) The analysis of part IV of title 28, United States Code, is amended by inserting immediately after the item relating to chapter 81 of such title the following new item:

"82. Intercircuit Tribunal of the United States Courts of Appeals ..... 1271".

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 5. (a) Section 1913 of title 28, United States Code, is amended to read as follows:

"§ 1913. Courts of appeals; Intercircuit Tribunal of the United States Courts of Appeals

"The fees and costs to be charged and collected in each court of appeals and in the Intercircuit Tribunal of the United States Courts of Appeals shall be prescribed from time to time by the Judicial Conference of the United States. Such fees and costs shall be reasonable and, in the case of the courts of appeals, shall be uniform for all the courts.".

(b) The item relating to section 1913 of title 28, United States Code, in the analysis of chapter 123 of such title, is amended to read as follows:

"1913. Courts of appeals; Intercircuit Tribunal of the United States Courts of Appeals.".

(c) The first paragraph of section 2072 of title 28, United States Code, is amended by inserting after "courts of appeals of the United States" the following: "and of the Intercircuit Tribunal of the United States Courts of Appeals".

(d) Section 2106 of title 28, United States Code, is amended by inserting immediately after "Supreme Court" the following: ", the Intercircuit Tribunal of the United States Courts of Appeals,".

AUTHORIZATION OF APPROPRIATIONS

SEC. 6. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

EFFECTIVE DATE; REPORTS; TERMINATION OF INTERCIRCUIT TRIBUNAL

SEC. 7. (a) This Act, and the amendments made by this Act, shall take effect on October 1, 1982.

(b) Section 604(d) of title 28, United States Code, is amended—

(1) in paragraph (4) by striking out the period at the end thereof and inserting in lieu thereof "; and"; and

(2) by adding at the end thereof the following:

"(5) lay before Congress annually statistical tables and other information which will accurately reflect the business which has come before the Intercircuit Tribunal of the United States Courts of Appeals.".

(c) The Intercircuit Tribunal of the United States Courts of Appeals, in consultation with the Director of the Administrative Office of the United States Courts, shall submit to the Congress, not later than October 1, 1986, a comprehensive report on its activities from the effective date of this Act.

(d)(1) The Intercircuit Tribunal of the United States Courts of Appeals shall terminate on September 30, 1987.

(2) This Act, and the amendments made by this Act, shall cease to be effective on September 30, 1987.

○

THE NEEDS OF THE FEDERAL COURTS

Report of the
Department of Justice Committee
on
Revision of the Federal Judicial System

JANUARY 1977

DEPARTMENT OF JUSTICE COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM

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A. Raymond Randolph, Jr., *Executive Secretary*
H. Bartow Farr, III, *Assistant Secretary*
Maurice Rosenberg, *Advisor*
Attorney General Edward H. Levi, Member Ex Officio
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The following attorneys in the Department of Justice also contributed studies to the Committee:

Pat Bailey
Bruce A. Baird
Edward J. Dauber
Bruce E. Fein
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PREFACE

In his address to the Sixth Circuit Judicial Conference on July 13, 1975, President Gerald R. Ford expressed his deep concern about the problems confronting the federal judicial system. At the President's direction, Attorney General Edward H. Levi appointed within the Department of Justice a Committee on Revision of the Federal Judicial System. With Solicitor General Robert H. Bork serving as Chairman, the Committee conducted numerous studies and discussed various proposals through June 1976, at which time this Report was prepared. Since then some of the Committee's proposals have been modified to take account of recently-enacted laws and other developments. These changes are reflected in the recommendations offered in the Report.

of two appointees of each of the three branches of Government. The Council would report to the Congress, the President and the Judicial Conference on the wide spectrum of developments that affect the work of the federal courts.

A slightly different version of the proposal was advanced in 1975 by the Commission on Revision of the Federal Court Appellate System, which supported creating a standing body to study and make recommendations regarding the problems of the federal courts.

Whatever its form, an agency is needed to project trends, foresee needs and propose remedial measures for consideration by the profession, the administration, the Congress and judicial groups. The judicial planning agency could draw on work done by Committees on the Judiciary of both Houses, the Federal Judicial Center, the Judicial Conference of the United States, the Department of Justice and private groups. The role of systematically auditing the functions of the federal courts must be an ongoing effort that permits the members of a permanent panel to develop deep, expert knowledge and a sure feel for what the courts need today and are likely to need tomorrow. This is not now being done in any coordinated or coherent way.

The Committee therefore recommends creation of a Council on Federal Courts.

III. The National Court of Appeals

After extensive study and hearings the Commission on Revision of the Federal Court Appellate System proposed in 1975 creation of a National Court of Appeals, a new seven-member tribunal, standing between the present regional Courts of Appeals and the Supreme Court. The Commission viewed the purpose of the tribunal as filling the need to resolve conflicts in rulings among the courts

of appeals on issues of national law and to enlarge the capacity of the federal judicial system to make definitive declarations in significant cases of national law, whether or not intercircuit conflicts were involved. It was not a goal of the proposal—which is now under review by a Senate subcommittee in the form of two bills (S. 2762, S. 3423)—to provide relief for the very heavy workload of the Supreme Court. Under the current version of the plan the National Court of Appeals would get its docket from the cases referred to it by the Supreme Court, with the possibility of ultimate return to that Court.

While recognizing the thought and effort behind the Commission report, the Committee opposes creation of a new National Court of Appeals at this time.

Adding a National Court of Appeals almost surely would increase the already heavy burden on the Supreme Court. The Justices, experienced at simply accepting or declining to accept cases for review, would have to decide in addition whether cases should be reviewed initially by the Supreme Court or referred to the National Court of Appeals. That determination would require considerable study to identify the pivotal issues of cases and to understand their ramifications. There would, inevitably, be disagreements about which of three choices, rather than the present two, was best. The problems inherent in that process are considerable. The quite natural effect of expanding the options will be to increase the complexity of the choice and thereby increase the time needed for these threshold determinations, which the Supreme Court is now able to make rapidly. The large growth in Supreme Court filings would then become substantially more of a burden than it now is.

Moreover, each decision on the merits by the National Court of Appeals would have to be scrutinized very carefully by the Supreme Court to ensure that an issue had not been finally resolved, or even dicta pronounced, in a manner contrary to its own views. An erroneous decision by a National Court of Appeals obviously carries far graver consequences than a similar decision by one of the present courts of appeals. The necessity of granting plenary review of a decision of the National Court might arise frequently, particularly if the judicial philosophies of the two benches should differ to any significant degree. That would impose upon many litigants four separate stages of federal adjudication with the expense and delay we all want to avoid, and a still further increase in the burden upon the Supreme Court.

In light of these dangers and others, a new National Court should be created only if the current need is clear and compelling. It is not. Rather than giving relief to the Supreme Court, or the other existing courts of appeals, the National Court of Appeals is aimed at increasing national appellate capacity in order to decide cases that involve conflicts in the circuits and significant issues that the Supreme Court, at least for a time, would not address. But there is little evidence that the Supreme Court has refrained from resolving any significant number of inter-circuit conflicts that involve recurring issues or questions of general importance. Moreover, a high proportion of the other cases deemed suitable for the National Court of Appeals involve specialized areas of tax or patent law. If more nationally-binding decisions are needed in these fields, the proper approach is to create national courts of tax and patent appeals. This not only would increase national appellate capacity for tax and patent cases, but also would benefit the courts of appeals by relieving them of such cases. Any other important cases that the Supreme Court should, but cannot now, decide could be handled under the existing system as the Supreme Court is relieved of its mandatory appellate jurisdiction.

Before we create a new national court with power and prestige exceeded only by the Supreme Court itself, we must be able to say that we are taking this momentous step because other remedial measures have been found wanting and because the gains clearly offset the disadvantages. At this time, such a statement cannot be made. The subject may warrant further study after the other proposals in this Report have been implemented; until then the National Court of Appeals proposal should not be adopted.

CONCLUSION

In speaking about improving the federal courts, we are considering how we can make a great institution greater. The plain answer is to give the courts the capacity to do the vital work the country expects of them. The dramatic increase in the business of the federal courts shows that we as a people believe in the rule of law and trust our courts to give us justice under law. It also shows that in the 201st year of the country's life we are still devoted to the Constitution's basic concept that the judicial branch is an equal partner in our government.

The American people expect that the courts will be reasonably accessible to them if they have claims they want judged. They also expect that the courts will not be so costly that they price justice out of reach. And they expect, too, that the courts will not be so slow that justice will come too late to do any good. People also have a right to expect that when they go into the federal courts, whether as litigant, witness or juror, they will be treated with decency and dignity. In short, they are entitled to believe that the courts will be humane as well as honest and upright.

To ensure that the federal court system continues to meet these legitimate expectations, the Commitee urges that serious consideration be given to the recommendations made here. They are necessary and will immeasurably strengthen our system of justice.

U.S. Department of Justice

Office of Legal Policy

Washington, D.C. 20530

November 10, 1982

MEMORANDUM

TO: Timothy J. Finn
Deputy Assistant Attorney General

FROM: David J. Karp

SUBJECT: Assignment to the Intercircuit Tribunal

This memorandum outlines various options for the selection of an Intercircuit Tribunal, constituted along the lines proposed in the Dole and Butler bankruptcy packages. It may prove useful if the selection issue becomes a subject of discussion. I see the main options to be the following:

1. Selection by the Chief Justice. This is the approach taken in the current formulation of the Intercircuit Tribunal proposal. It follows the normal practice in relation to assignments to special courts and commissions, and other temporary assignments of judges, which are handled by the Chief Justice. It is also the simplest approach, requiring a minimum of consultation and negotiation.

2. Selection by the Supreme Court. The Supreme Court as such, rather than the Chief Justice individually, might be made the selecting authority. There are rough parallels to this in other areas. The Supreme Court selects the Director of the Administrative Office of the U.S. Courts and its own officers (Clerk, Marshal, Reporter, Librarian). The argument for this approach is that the utility of the Tribunal will depend on the Court's willingness to refer cases to it. This in turn depends to some extent on the confidence of the Associate Justices, as well as the Chief Justice, in the judges on it.

3. Selection by the Chief Justice with the Concurrence of Associate Justices. In an early version of the Intercircuit Tribunal proposal advanced by Judge Leventhal, he suggested that selections be made by the Chief Justice with the concurrence of five other Justices. 1/ This would assure that the judges chosen

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1/ See Leventhal, A Modest Proposal for a Multi-Circuit Court of Appeals, 24 Am. U. L. Rev. 881, 912-13 (1975).

would be agreeable to the Chief Justice and would also enjoy the confidence of most of the rest of the Supreme Court.

4. Selection by the Chief Justice from Nominees Proposed by the Circuit Courts. For example, each circuit court could submit three names, from which the Chief Justice would select one or two. The main argument for this approach is that the Intercircuit Tribunal could be regarded as a kind of representative en banc of all the circuits, so their views concerning appropriate selections should be an important factor. This strikes me as a less sensible approach than the preceding two, since the utility of the Tribunal will depend more on the Supreme Court's confidence in it than on the Circuit Courts' feelings about its composition.

5. Selection by the Judicial Conference. Under this approach, the Chief Justice would still play an important role in selection, given his status as presiding officer of the Judicial Conference and the Conference's traditional deference to his leadership. The argument for this option is essentially the same as for the preceding option.

6. Selection by the President Subject to Senatorial Confirmation. This approach was proposed in the Tax Division's critical memorandum on the Intercircuit Tribunal Proposal. The argument is that the same approach should be taken to selection of the Tribunal as to appointment of Supreme Court Justices, given the Tribunal's importance and its authority to render nationally binding decisions. The contrary argument is that this would politicize the selection process and could produce a Tribunal that is out-of-step with the Supreme Court in terms of general outlook, though the Tribunal is expected to function as a kind of adjunct to the Court. There is no clear Constitutional problem in having the political branches make temporary assignments of judges to one court or another, but concerns may be raised regarding this approach on general separation-of-powers grounds.

7. Other Approaches. The preceding options could obviously be hybridized in various ways. There would be little point in trying to spell out all the possibilities. Any of the options committing the assignment function to the Justices or the Chief Justice could be supplemented with a requirement of consultation with the Judicial Conference or the Courts of Appeals to provide some advisory input from the Circuits. The various options might also be supplemented with a requirement that there be at least one judge on the Tribunal from each Circuit, though doing so could result in a problem for the smaller Circuits. 2/

2/ The smallest Circuit, the First, has only four active judges and one senior judge.

On balance, I think the best options are clearly #2 and #3 -- selection by the Supreme Court, or by the Chief Justice with the concurrence of most of the Associate Justices.